IN THE

Supreme Court of the United States

1976 TERM

No. 76-1578

SALVATORE VISCONTI,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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OFFICIAL REPORTS AND OPINIONS

The Court of Appeals for the Third Circuit affirmed the judgment entered against the Petitioner in the District Court for New Jersey, and in another order issued simultaneously denied Petitioner's Motion to Remand his case back to the District Court for an evidentiary hearing to establish a record of his denial of a fair trial caused by the incompetent representation of his trial counsel. Following the Court of Appeals' suggestion in its opinion, Petitioner filed in the District Court a Motion for a new trial which was denied without a hearing or opinion. The Court of Appeals then denied with an opinion Petitioner's Motion for a rehearing with a suggestion for a rehearing *en banc*.

JURISDICTION

On March 17, 1976, at 10:10 P.M., a jury pronounced the Defendant guilty for violating the provisions of a Federal criminal statute namely 18 U.S.C. Section 1952 and 18 U.S.C. Section 2 on two counts of a three count indictment.

On March 4, 1977, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court and on the same date denied Defendant's Petition filed on October 15, 1976, to remand the case to the District Court for an evidentiary hearing to show that Defendant had failed to receive a fair trial as required under the 6th amendment to the U.S. Constitution because of the incompetency of his trial counsel.

On April 12, 1977, the Court of Appeals denied Petitioner's Motion for a rehearing with a suggestion for a rehearing *en banc*.

This Honorable Court has jurisdiction to review the judgments below by Writ of Certiorari pursuant to 18 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a Defendant seeks to bring evidence of incompetency of counsel prior to and during trial before the Appellate Court to establish a claim of denial of a fair trial under the 6th amendment of the U.S. Constitution, has the said Court erred when it denied a Petition to remand for an evidentiary hearing in the District Court basing its decision upon the view that finality of direct appeals should be the predominent consideration in cases in which a 28 U.S.C.A. Section 2255 review is available in the District Court albeit after incarceration.

2. Has the Appellant been represented by competent counsel when said counsel represents four Defendants with conflicting defenses; commences the trial without consultation

with his clients; who is on trial in another case in another state when this trial begins; who fails to discuss the trial and the tactics with his clients; who fails to put his client on the stand without properly explaining the Appellant's rights to said Appellant, even though Appellant insisted on testifying; who fails to investigate the case and especially the chief Government witness; who refuses during trial to converse with his client, and in fact attempts to present a picture of his client which is inaccurate and false; who fails to call any character witnesses for his clients or any witnesses who can refute the Government's testimony; and who fails to file any *Luck* motions so that his client may testify without exposure of a prior conviction?

3. Does Title 18, United States Code, Section 1952, accord Federal jurisdiction where the only interstate activity was the wholly incidental and fortuitous fact that the Appellant resided in one State and the public official in another, when it was Government law enforcement officials who encouraged the public official to establish an attempted bribery scheme so as to establish Federal jurisdiction?

4. Does Title 18, United States Code, Section 1952, accord Federal jurisdiction in the present case when the facts at the trial show *only* that the Appellant *attempted* to influence the behavior of the public official and did not "thereafter perform or attempt to perform any of the acts specified . . ."?

5. Have the Petitioner's rights to a fair trial been denied when the Government fails to disclose after the cross-examination of its chief witness has been completed and the witness excused that this witness, who encouraged and promoted the bribery scheme has been or may possibly have been under investigation by the Federal Bureau of Investigation?

STATUTORY PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C.A. §1952

Interstate and foreign travel or transportation in aid of racketeering enterprises. – (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to–

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C.A. §2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

FEDERAL RULES OF CRIMINAL PROCEDURE
RULE 33

New Trial

The Court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take

additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

A. Procedure

On March 17, 1976, a jury pronounced Defendant guilty of violation of 18 U.S.C.A. Section 1952 and 18 U.S.C.A. Section 2 under counts one and two of a three count indictment for having attempted to bribe a public official of a New Jersey city. On April 28, 1976, Judge Stern sentenced Defendant to a five (5) year prison term and Defendant began serving said sentence immediately. Counsel that appeared at the sentencing hearing was new counsel and not in any way associated with trial counsel.

On May 13, 1976, Defendant filed *pro se* a Notice of Appeal in the District Court.

On August 23, 1976, Defendant engaged current counsel who learned that a brief was due on August 10, 1976. An extension of time to file was requested, and granted until September 30, 1976, and then extended again until October 30, 1976.

On October 15, 1976, Defendant filed a Motion to Remand this case for an evidentiary hearing on the incompetency of trial counsel in the District Court. Petitioner received notice that the Petition had been referred to a merits panel and that the Motion to Stay the filing of a brief had been granted for thirty (30) days if the Court denies the Motion to Remand.

On February 4, 1977, contrary to the Order of October 27, 1976, the Defendant received notice to file a brief on the issues under appeal. On March 4, 1977, the Court affirmed the judgment of the District Court. On March 4, 1977, the Court denied Defendant's Motion to remand to the District Court for an evidentiary hearing on the incompetency and ineffectiveness of defense counsel and for filing a Motion for a new trial. On March 4, 1977, the Court denied Defendant's Motion to return the sealed portion of the transcript to the District Court in order for Defendant to Petition the District Court to obtain a copy of the sealed record.

On March 15, 1977, Defendant filed a Motion for rehearing with a suggestion for a rehearing *en banc* for a remand based upon the Court's opinion citing *U.S. v. Garcia*, 544 F.2d 601, N. 1 (3rd Cir., 1976) which was denied on April 12, 1977.

On March 16, 1977, the Defendant filed a Motion with the District Court for a new trial as suggested by the Court's opinion of March 4, 1977, and this Motion was denied on March 18, 1977.

B. Facts

Petitioner Salvatore Visconti is a resident of Brooklyn, New York, and the controlling owner of a fire adjustment business and construction business. Through his friend, Defendant Bressler, he was introduced to Mr. Piro, who was the director of the housing program for New Jersey (N.T., p. 191). Petitioner was planning to expand his business operations into New Jersey, and was trying to learn how to do this expansion and what business was available to an outsider.

Petitioner and Mr. Bressler had first met with Captain Taylor, who had told him that he was not interested in doing business with Petitioner; that even if Petitioner offered him any payment for referral work, he was not interested in doing business with Petitioner; Petitioner was indicted for this conversation but was acquitted.

At the first meeting with Piro, Petitioner and Bressler talked of all the money which was available to be made with an association with Piro (N.T., p. 166); of how they would help Piro raise money if and when he ran for Mayor. Piro immediately after the meeting went to the Mayor of Jersey City and said "... I had been offered a bribe" (N.T., p. 170), and the Mayor referred him immediately to the Federal Bureau of Investigation. The F.B.I. encouraged him to go on and try to establish other meetings with Petitioner in New Jersey and to encourage Petitioner to attempt to bribe Piro further (N.T., p. 171). To that end, Piro made numerous telephone calls to Petitioner, and over a period between May 2 to June 26, 1975, had many meetings and telephone calls, exchanged some papers, and throughout recorded on tape with the aid of the F.B.I. the conversations he had with all the Defendants.

After his arrest, Petitioner engaged the legal services of James LaRossa, Shargel and Fischetti, New York attorneys.

On February 18, 1976, in open court and on record, Judge Stern inquired of Petitioner and his daughter, Valerie Visconti, if they believed there was any conflict of interest to having Mr. LaRossa represent both of them (N.T. of February 19, 1976, Court hearing, p. 27). The answer of Petitioner is quite clear that he only wanted Mr. LaRossa to represent him; not Mr. LaRossa's firm, but only Mr. LaRossa. It was also quite clear that Mr. LaRossa was on trial in New York, and would in all likelihood remain on trial in New York until the time of this case's start, and, in fact, when this case did start, Mr. LaRossa was still on trial in New York with a jury out (N.T., p. 6). Moreover, in open Court before the trial started, the Judge questioned Mr. LaRossa if he could see any conflict in representing four defendants, and Mr. LaRossa stated he could adequately do so (N.T., p. 3). However, when requesting exceptions to his charge to the jury, the Court deliberately refrained from emphasizing the guilt of the corporate Defendants, to the detriment of the individual defendants (N.T., p. 2051), and Mr. LaRossa himself admits

he has had difficulty in wearing two hats during the trial when arguing to the jury (N.T., p. 1924).

After the Government's chief witness, Piro, had finished testifying and had been examined by the Court, a letter was received by the Court, a copy of which is attached to this Brief, and the Court held a meeting at side bar and then ordered the minutes of this meeting sealed (N.T., pp. 1246, 1247). The sealed minutes have been sent to this Court sealed, and although their counsel has seen them, neither this counsel nor Petitioner's trial counsel have had an opportunity to discuss the same with Petitioner and to use whatever knowledge that is contained therein towards the defense of the Petitioner.

REASONS FOR GRANTING CERTIORARI

A. As To the Procedure for Establishing Claims of Ineffective Assistance of Counsel, There Is Conflict Among the Various Circuits.

The basic problem presented by this case revolves around the procedure to bring facts outside the record which support a claim of ineffective assistance counsel before the Court of Appeals after a *pro se* appeal has been filed, when no Motion for a new trial was filed in the District Court and while the Defendant is free on bond thereby not having available a Motion under 28 U.S.C. Section 2255.

This problem is compounded because the establishment of claims of ineffective assistance of counsel usually depends upon facts outside of the trial record, which must be developed by means of additional evidence. Thus the Defendant finds himself incarcerated after sentencing, and he no longer employs the service of his incompetent trial counsel. Moreover, trial counsel usually fails to familiarize Defendant with post trial relief and, often times, fails to make arrangements with his client to represent him after trial; in fact, what usually happens is that the Defendant and his trial

lawyer become estranged after the verdict. Thus the Defendant, unrepresented, may wait beyond seven days, or in order to preserve his right for appellate review, files a *pro se* Notice of Appeal, thereby stripping him of his right to file a Motion for a new trial and consequently, to bring into the appeal, facts outside of the record.

In the case at bar, Petitioner was told by the Appellate Court to file a Motion for a new trial in conformance with the preference established in *United States v. Garcia*, 544 F.2d 681 (3rd Cir., 1976). It is frustrating to note that Garcia was decided after Petitioner filed his Notice of Appeal, and Petition for a Remand for an evidentiary hearing.

The law establishing a procedure to follow in a fact situation like the case at bar is woefully inadequate and in a serious state of conflict among the circuits. In the case of *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir., 1973), the Court states that when a claim of ineffective assistance is contemplated, it should first be presented to the District Court in a motion for a new trial. However, since a notice of appeal automatically takes the case out of the District Court and lodges jurisdiction exclusively in the Appellate Court, the question then becomes how to get the case back to the District Court to develop facts outside the record which support Defendant's contention, or how to get the evidence before the Appellate Court if the Appellate Court should decide to hear the appeal itself.

As the Court states in *DeCoster, supra:*

> "Much of the evidence of counsel's ineffectiveness is frequently not reflected in the trial record (e.g., a failure to investigate the case, or to interview the defendant, or a witness before trial). As a result, in effectiveness cases have often evolved into tests of whether appellate Judges can hypothesize a rational explanation for the apparent errors in the conduct of the trial. But neither one Judge's surmise nor another's doubt can take the place of proof. Thus, when a claim of ineffective assistance is contemplated, it should first be presented to the district court in a motion for new trial. In such proceeding, evidence *dehors* the record may be submitted by affidavit and when necessary the district Judge may order a hearing or otherwise allow counsel to respond. If the trial court is willing to grant the motion, this court will remand. If the motion is denied, the appeal therefrom will be consolidated with the appeal from the conviction and sentence. The record of any hearing held on the motion and any documents submitted below, will become part of the record on appeal." *Id.*, at 1204, 1205.

The problem with this *DeCoster* guide is what motion can be filed when the case is in the Court of Appeals, since jurisdiction is in the Court of Appeals. The other problems of the *DeCoster* guideline is what happens if the District Court refuses to grant a hearing. The effect then would be an appeal to the Court of Appeals, but the only record would be the trial records and the affidavits, thereby at this stage of the proceedings preventing the Defendant from having an evidentiary hearing at this early stage on a very vital issue not only to him, but one which lies at the heart of the integrity of the judicial system itself.

These problems were directly addressed by the Court in *United States v. Weaver*, 422 F.2d 711 (D.C. Cir., 1970). The Defendant was convicted in the District Court and appealed directly. On appeal, Defendant alleged ineffective assistance of counsel, alleging many of the same grounds which Defendants allege in the case at bar, namely, that his trial counsel failed to investigate witnesses, including government witnesses, failed to examine the physical scene of the alleged crime, and failed to be properly prepared. In remanding, the Court set clear guidelines:

> "Ineffective assistance of counsel, of course, is cognizable under 28 U.S.C. Section 2255 (1964). Rather than relegate appellant to that remedy, *in the interest of efficient administration of justice and in order to develop the facts NOW*, we have decided to remand this case to the trial court to determine whether a new trial should be granted." (Emphasis added) *Id.*, at 712.

In *Dyer v. United States*, 379 F.2d 89 (D.C. Cir., 1967), the Defendant alleged that counsel failed to call Defendant to rebut the government's evidence; failed to subpoena a material witness; that counsel allowed hearsay evidence to be introduced without objection; that there was a variance between what counsel stated he would prove in opening argument and the evidence he presented. The Court found:

> "The majority is satisfied that in net result the defense fell substantially short of what we should consider adequate. Cumulatively, various facets became so meaningful that we are of the opinion a new trial fairly is required. *Since we feel a remand is insufficient because of the state of the record before us, we conclude that the conviction must be reversed.*" (Emphasis added) *Id.*, at 89, 90.

Judge Bastian in the dissent stated:

> "This is a direct appeal on the record. All in all, that record, which I have reviewed with care indicates to me that this case should not be reversed. Certainly the charges made after the case left the District Court are not part of the record before us. To my knowledge, never before have we summarily reversed a case for ineffective assistance of counsel without *first providing for a full hearing on that contention, and granting the counsel whose professional standing is attacked* the opportunity to give his side of the matter." *Id.*, at 92.

In *United States v. Douglas*, 488 F.2d 1331 (D.C. Cir., 1973), the Defendant appealed directly from a District Court conviction. The Court of Appeals held that the record was inadequate to determine whether the Defendant was denied his rights to a speedy trial, and the record was remanded for supplementation to provide an *adequate basis for review*. In *United States v. Thomas*, 536 F.2d 1253 (8th Cir., 1976), there was a direct appeal from a District Court conviction. The Court of Appeals held that a hearing was required to determine whether Defendant was deprived of counsel at a pretrial lineup, and remanded to the District Court.

In *United States v. Butler*, 504 F.2d 220 (1974), the Court of Appeals for the District of Columbia remanded the case to the District Court for a hearing to determine if the Defendant had been properly represented by counsel by an individual who was not a member of the D.C. Bar after a direct appeal had been made to the Circuit Court, and after briefs were filed and oral arguments were held before the Court.

In *United States v. Moore*, 529 F.2d 355 (D.C. Cir., 1976), the Court reaffirmed its *DeCoster* standards and remanded for a hearing to determine what defense counsel did to prepare the case by interviewing witnesses and whether or not he consulted with his client before he made tactical decisions.

The Fifth Circuit in *Huntly v. United States*, 535 F.2d 1400 (5th Cir., 1976), has characterized this remand procedure as an extraordinary remedy, and while they declined to use it they infer that where specific facts are alleged and serious questions presented, they would remand:

> "We agree with appellants that the prosecutor's participation in developing the stipulations demonstrates prosecutorial awareness of the alleged incompetency so that, notwithstanding the retained status of counsel, this aspect of their trial representation should be evaluated under this circuit's formulation of the standard of the sixth amendment. *Cf. Fitzgerald v. Estelle*, 505 F.2d 1334, 1336-37 (5th Cir., 1974) (en banc). This standard requires 'not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.' *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.), cert. denied, 368 U.S. 877, 82 S. Ct. 121, 7 L.Ed.2d 78 (1960) (emphasis in original). Based on the record before us, appellants' representation at trial complied with these standards. We decline appellants' invitation to invoke the exceptional remedy of a remand from this direct appeal for an evidentiary hearing: the isolated examples of careless or inappropriate language to which they point do not raise a serious question on this issue. The effort to expand the record to go behind the face of the documents to explore trial counsel's representation is appropriate, if at all, only through a proceeding under 28 U.S.C. Section 2255 (1970)." *Id.*, at 1405.

Under the facts of the case *sub judice*, there does not exist a procedural rule that clearly copes with the particular situation. Under Rule 33, a Motion for new trial must be filed within seven days normally a Petition for 2255 relief is not available unless the Defendant is incarcerated and while there is a direct appeal pending. *Womack v. U.S.*, 129 U.S. App. D.C. 407, 395 F.2d 630, 631 (1968). At the time of filing the Petition for a remand for an evidentiary, Defendant could not find a Third Circuit case which directly stated the accepted policy of that circuit.

The Third Circuit clearly stated that jurisdiction in the Court of Appeals precludes jurisdiction in the District Court, *TMA Fund, Inc. v. Biever*, 520 F.2d 639 (3rd Cir., 1975). It would therefore appear that the District Court would lack jurisdiction to hear a Motion for new trial filed after a Notice of Appeal has been filed. Thus, the decision of the Court of Appeals in the case at bar, and its reference to footnote #1 of *U.S. v. Garcia, supra*, indicates *for the first time*, the Third Circuit prefers a Motion for a new trial be filed in claims of ineffective assistance of counsel. Since *Garcia* was rendered after Petitioner filed his Notice of Appeal, and in light of *Biever, supra*, Petitioner is at a loss to know how to comply with the *Garcia* procedural preference.

The necessity for settling the conflict among the circuits is the need for a uniform procedure because the different approaches can produce different results for a Defendant. A Motion under 28 U.S.C.A. Section 2255 can only be used if the Defendant is incarcerated. Therefore, there is a strong possibility that another District Court and Appellate Court will review the case causing duplication of time and effort. Since 28 U.S.C.A. Section 2255 is a civil action the Defendant has a heavier burden of proof and because of his incarceration will have difficulty in preparing or finding his virtues with memories impaired. With the passage of time, death of a key witness would deny him his hearing at all. But perhaps the most serious difference is that the District Court will deny his Motion without a hearing at all.

On the other hand, a remand for hearing eliminates most of these problems and lowers the risk on some of the others. Defendant is assured of a hearing; since the time frame is short the chances are better than under a 28 U.S.C.A. Section 2255 that the witness will be alive, available, capable of having Defendant prepare them for a hearing, and with memories unimpaired.

Finally, contrary to the Third Circuit's view, a remand will expedite finality of judicial action in that all relevant issues will be before the Court at one time.

B. As To The Substantive Law In The Area Of Ineffective Assistance Of Counsel There Exists Conflict, Confusion and Total Uncertainty.

Petitioner's claims of error on ineffective assistance of counsel are divided into two distinct areas. The first claim is that since defense counsel represented four defendants the standards established under *Glasser v. U.S.*, 315 U.S. 60-62 S. Ct. 457, 86 L.Ed. 680 (1942) were abridged.

The Court of Appeals, by its failure to reverse Petitioner's conviction sanctioned the trial Court's departure from the standards established in the Third Circuit for joint representation. In *Government of the Virgin Islands v. Hernandez*, 476 F.2d 791 (3rd Cir. 1973) the Third Circuit, citing the United States Supreme Court, established clear guidelines which must be followed when more than one defendant are represented by the same counsel in the same case during the same trial:

> "The Supreme Court has held that the sixth amendment right to fair and effective assistance of counsel can be abridged when several defendants are represented by one counsel. *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1942). Although recognizing that this constitutional right could be waived, the Court said any waiver must be made knowingly and intelligently. 315 U.S. at 70-71, 62 S. Ct. 457. Drawing on *Glasser's* imposition on the trial judge of a duty to preserve a

defendant's right to effective assistance of counsel, the District of Columbia Circuit has required trial judges to ascertain from defendants whether their choice of joint counsel is an informed decision. *Campbell v. United States*, 122 U.S. App. D.C. 143, 352 F.2d 359 (1965). We have never gone so far as to impose this affirmative obligation on the trial judge. *United States v. Rispo*, 470 F.2d 1099, 1102 (3rd Cir. 1973). We have, however, refused to find a waiver of this right in the face of a silent record on the issue, noting that the *Glasser* required 'the trial judge . . . to "indulge every reasonable presumption against the waiver".' *Government of the Virgin Islands v. John*, 447 F.2d 69, 74-75 (3rd Cir. 1971). . .

"*We recommend, that on the retrial of this case, the trial warn each defendant of the possible dangers of joint representation* (emphasis added) . . ." *Id.*, at pp. 793-794.

The trial court's questioning of the individual defendants was not sufficient to constitute the standard of warning required under *Glasser, supra*, and *Hernandez, supra*, for the defendants to make a knowing and intelligent waiver of their rights to individual counsel.

The second claim is that the actions of counsel were not in conformance with and in fact conflicted with the recommended standards for defense counsel. In the statement of facts Petitioner delineated certain allegations which he claims render his representation ineffective. In support of these claims, Petitioner cites the following authorities:

(a) Counsel failed to interview government witnesses. *United States v. DeCoster*, 159 U.S. App. D.C. 320, 487 F.2d 1197 (1973); *Mason v. Balcom*, 531 F.2d 717 (5th Cir., 1976).

(b) Counsel failed to interview Defendant's witnesses. *United States v. DeCoster, supra; Mason v. Balcom, supra.*

(c) Counsel failed to call witnesses requested by the Defendant without explaining to Defendant the reasons for failing to call said witnesses. American Bar Association Standards of the Defense Function; *United States v. Fessel*, 531 F.2d 1275 (5th Cir., 1975).

(d) Counsel failed to know the law applicable to the case at bar. *United States v. Goodwin*, 531, F.2d 347 (6th Cir., 1976); *Mason v. Balcom, supra.*

(e) Counsel failed to know the facts and is generally unprepared for trial. *Navarro v. Johnson*, 355 F. Supp. 676 (D.C. Pa., 1973); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir., 1976).

(f) Counsel failed to consult with his client about key facts, about tactical choices, and potential strategies, and failed to inform him that he *alone* had the right to decide not to testify. *United States v. Moore*, 529 F.2d 358 (1976); *United States v. DeCoster, supra.*

(g) Counsel failed to investigate the facts of the case. *Ganger v. Payton*, 258 F. Supp. 387 (D.C. Vir., 1966); *Coles v. Payton*, 389 F.2d 224 (4th Cir., 1968); *Gorton v. Swenson*, 497 F.2d 1137 (8th Cir., 1974).

(h) Counsel failed to make any motion to exclude Defendant's prior conviction so that he could testify for himself and as a witness for his daughter without fear of impeachment on unrelated convictions. *Greenberg v. United States*, 419 F.2d 808 (3rd Cir., 1969); *Luck v. United States*, 348 F.2d 763 (D.C. Cir., 1965); *Suggs v. United States*, 391 F.2d 971 (D.C. Cir., 1968).

(i) Counsel failed to inform Defendant that he personally had the choice whether or not to testify and that this right was not a decision of counsel to make but for Defendant to make. *Dyer v. United States*, 379 F.2d 89 (D.C. Cir., 1967); American Bar Association Standards of the Defense Function.

(j) Counsel failed to consult with the Defendant during cross-examination of key government witnesses and thereby failed to elicit a key defense for Defendant. *Dixon v. Hopper*, 407 F. Supp. 58 (M.D. Ga., 1976).

(k) Counsel failed to call character witnesses for a 20-year-old-girl who had never had any record at all. *Mason v. Balcom, supra.*

Since defense attorney James M. LaRossa came into the trial of this case directly from another trial in another state, error is as the court stated in *Mason v. Balcom, supra:*

"The assembly line of nature of the representation given petitioner by attorney Watts does not approach the level of effectiveness demanded by our cases."

C. As To Title 18, U.S. Code Section 1952 Jurisdiction.

The Court of Appeal's finding jurisdiction under 18 U.S.C. Section 1952 results in a conflict with the Second Circuit's holding in *U.S. v. Archer*, 186 F.2d 670 (2d Cir., 1973). Jurisdiction under this act cannot be established by government agents manufacturing the interstate elements of the crime. The Court stated:

"While the precise holding of *Rewis* was that the proprietors of a Florida gambling establishment did not violate the Travel Act merely because some of their customers came from Georgia, a course of action foreseeable and even designed, the opinion indicates that the Act is not to be stretched to the limits of its language. The Court stated, 401 U.S. at 811, 91 S. Ct. at 1059, that the legislative history revealed 'that Section 1952 was aimed primarily at organized crime, and more specifically, at persons who reside in one State while operating or managing illegal activities located in another.' The warnings that 'Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships' and 'could overextend limited federal police resources,' 401 U.S. at 812, 91 S. Ct. at observations were reiterated in *Erlenbaugh v. United States*, 409 U.S. 239, 247 n. 21, 93 S. Ct. 477, 34 L.Ed.2d 446 (1972). . .

"Our holding is rather than when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings, cf. 28 U.S.C. Section 1359. As the late Judge Freeman said with respect to civil actions in *McSparran v. Weist*, 402 F.2d 867, 873 (3rd Cir., 1968) (en banc), cert. denied, 395 U.S. 903, 89 S. Ct. 1739, 23 L.Ed.2d 217 (1969), manufactured jurisdiction 'is a reflection on the federal judicial system and brings it into dispute.' Whatever Congress may have meant by Section 1952(a)(3), it certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime." *Id.*, at 680.

The facts in this case clearly indicate that had Piro not gone to the F.B.I. and the F.B.I. encouraged him to call Appellant and to encourage Appellant to come into New Jersey to meet with Piro, nothing further would have happened after the first meeting. This point is supported by the fact that the jury did acquit Appellant of the Taylor indictments, which were based essentially upon the same facts as the initial Piro meeting.

The Court, in *Archer, supra*, went on to emphasize where the Federal element is supplied by undercover agents, a higher standard is to be applied. *Id.*, at 685-686. See also, *United States v. Presley*, 478 F.2d 163 (5th Cir., 1973), and *United States v. Altobella*, 442 F.2d 310 (1971).

D. As To The Lack Of Jurisdiction Because The Evidence Failed To Comply With The Elements Required By The Act.

Under the Act there must be interstate activity to "otherwise promote, . . . any unlawful activity," and thereafter the defendant must perform or attempt to perform the unlawful activity. In this case, petitioner only promoted and never went or performed the third step, which was to perform or attempt to perform the unlawful activity.

Actually, it appears that in drafting this Act, Congress never intended to cover the situation where there was only

attempted bribery. The New Jersey statute is unusual in the sense that bribery is defined as attempted bribery. Therefore, the question is, can an attempt of bribery also act to fulfill the requirements of the third part of the statute, namely the performance of the promotion?

The Act should be construed strictly. *United States v. Rewis*, 401 U.S. 808, 91 S. Ct. 1056, 28 L.Ed.2d 493 (1971); *United States v. Hathaway*, 534 F.2d 385 (4th Cir., 1976). Moreover, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *Bell v. United States*, 349, U.S. 81, 99 L.Ed.2d 905, 75 S. Ct. 620 (1955). See also, *United States v. Bass*, 404 U.S. 336, 30 L.Ed.2d 488, 92 S. Ct. 515 (1971). In *United States v. Universal CIT Credit Corp.*, 344, U.S. 218, 92 L.Ed.2d 260, 73 S. Ct. 727 (1952), the Court stated:

> "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

In this Act, Congress has spoken of attempts and the performance of bribery not the attempts at attempting to make an attempt at bribery a crime.

E. As To The Denial Of Due Process Because The Government Failed To Disclose Pertinent Information To Petitioner.

In *Giglio v. United States*, 405 U.S. 150, 31 L.Ed.2d 104, 92 S. Ct. 768, the Government's entire case depended almost entirely on one witness' testimony. The Court found that the Government had the responsibility to make known to defense counsel "all relevant information on each case to every lawyer who deals with it."

This case is dependent upon the testimony of two Government witnesses, and the convictions dependent upon

only one witness (the jury acquitted the Appellant of the charges related to the other witness). The sealed testimony reveals that this key witness had at some point prior to his meeting with the Petitioner been under investigation by the F.B.I. This information, even if the investigation was terminated at a later date, would have been helpful to the Appellant's attorney in preparation of the case, in that he could have found an area of investigation as to why Piro was so eager to go to the F.B.I. after the initial interview with Appellant, and could have used this information at a crucial and material time effected the Appellant's case and denied him a fair trial.

In *United States v. Fried*, 486 F.2d 201 (2nd Cir., 1973), the negligent non-disclosure of a key witness' indictment required the reversal of the charge against the defendant. The Court stated:

> "Since the Government's case against Mrs. Fried in support of Count 3 rested almost entirely on Levy's testimony, it is clear that if the indictment against him for possession of other stolen goods had been revealed by the Government his credibility would probably have suffered a severe blow. There is therefore a significant chance that such material disclosure would have raised a sufficient doubt in the minds of enough jurors to negate conviction."

In this case, Petitioner has been unable to determine if the withholding of information was negligent or intentional. Because the transcript was ordered sealed by the Trial Judge, Petitioner does not know the exact materiality of the withheld information, nor does Petitioner know when the Government obtained the knowledge of said information. The standard to be applied to the intentional non-disclosure is less strict than the standard for negligent non-disclosure. *Brady v. Maryland*, 373, U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). As the Court stated in *Giglio, supra*, when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the general rule. Petitioner contends

that under *Fried, supra*, there is a significant chance that the disclosure would have raised a doubt in the jurors' minds, and that even under the stricter test, Petitioner has met the burden of proof necessary.

RELIEF

Petitioner respectfully prays that in light of all of the foregoing reasons and arguments, that this Honorable Court grant this Writ of Certiorari.

Respectfully submitted,

/s/ Sidney L. Krawitz
SIDNEY L. KRAWITZ

/s/ Robert E. Sigal
ROBERT E. SIGAL

/s/ Teddy Ray Price
TEDDY RAY PRICE
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1674

UNITED STATES OF AMERICA

v.

RAPHAEL BRESSLER, SALVATORE VISCONTI, JOHN J. HART, JR., VALERIE VISCONTI, JOHN AI, ADJUSTMENT CONSTRUCTION CORPORATION, JOHN J. HART & SONS, INC.,

Salvatore Viscounti,
Appellant

(Criminal No. 75-420, D. of N.J.)

Submitted Under Third Circuit Rule 12(6)
February 14, 1977

Before SEITZ, *Chief Judge*, VAN DUSEN and WEIS, *Circuit Judges*.

JUDGMENT ORDER

After considering the issues raised by the appellant, to-wit:

(1) Has the Appellant been represented by competent counsel when said counsel represents four defendants with conflicting defenses; commences the trial without consultation with his client, who has hired only him and not his firm; who is on trial in another case in another State when this trial begins; who fails to discuss the trial and the tactics with his

client; who fails to put his client on the stand without properly explaining the Appellant's rights to said Appellant, even though Appellant insisted on testifying; who fails to investigate the case and especially the chief government witness; who refuses during trial to converse with his client, and in fact attempts to present a picture of his client which is inaccurate and false; who fails to call any character witnesses for his clients or any witness who can refute the Government's testimony; and who fails to file any *Luck* motions so that his client may testify without exposure of prior convictions? *See U.S. v. Garcia*, 544 F.2d 681, n. 1 (3d Cir. 1976).

(2) Does Title 18, United States Code, §1952 accord Federal jurisdiction where the only interstate activity was the wholly incidental and fortuitous fact that the Appellant resided in one State and the public official in another, when it was government law enforcement officials who encouraged the public official to establish an attempted bribery scheme so as to establish Federal jurisdiction?

(3) Does Title 18, United States Code, §1952 accord Federal jurisdiction in the present case when the facts at the trial show only that the Appellant attempted to influence the behavior of the public official and did not thereafter perform or attempt to perform any of the acts specified?

(4) Have the Appellant's rights to a fair trial been denied when the government fails to disclose that the government's chief witness and the person who encouraged and promoted the bribery scheme has been or may possibly have been under investigation by the Federal Bureau of Investigation until after the cross-examination of this said witness has been completed and the witness excused?

(5) Has the Appellant been permitted a fair trial and the right of a fair appeal when in the course of the trial sealed testimony which Appellant himself has not seen or heard is introduced into evidence, and which has not been made available to the Appellant prior to the preparation of this appeal and brief because of Orders sealing the said evidence by the district court?

(6) Should the scope of Title 18, United States Code, §1952 be expansive so that incidental, minimal and fortuitous contact with interstate facilities and travel be sufficient to permit Federal jurisdiction or should the Act be restrictive so that interstate travel and use of facilities have to be an integral part of the criminal activity itself?

(7) Did the Court commit reversible error when it excluded two series of taped conversations known referably as the "Piro-Siegal" and the May 1st" tapes? Appellant contends that the exclusion of each tape constituted reversible error in and of itself, and the exclusion of both tapes compounded the court's violation of Appellant's right to due process, which rendered the proceedings fundamentally unfair, and the Trial Court clearly abused its discretion in excluding said evidence.

(8) Did the trial court commit reversible error in allowing the tape transcripts to be read into evidence without a proper foundation having been laid?

IT IS ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

COLLINS J. SEITZ
Chief Judge

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

DATED: March 4, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1674

UNITED STATES OF AMERICA

v.

RAPHAEL BRESSLER, SALVATORE VISCONTI, JOHN J. HART, JR., VALERIE VISCONTI, JOHN AI, ADJUSTMENT CONSTRUCTION CORPORATION, JOHN J. HART & SONS, INC.,

Salvatore Viscounti,
Appellant

(Criminal No. 75-420, D. of N.J.)

ORDER

Present: SEITZ, *Chief Judge*, VAN DUSEN AND WEIS, *Circuit Judges.*

ORDERED that appellant's motion to remand to the district court for an evidentiary hearing on the incompetency and ineffectiveness of James M. LaRossa, Esquire, defense counsel and for filing of a motion for a new trial is denied. *See United States v. Garcia*, 544 F.2d 681, n. 1 (3d Cir. 1976).

By the Court,

/s/ Seitz
Chief Judge

DATED: March 4, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1674

UNITED STATES OF AMERICA

v.

RAPHAEL BRESSLER, SALVATORE VISCONTI, JOHN J. HART, JR., VALERIE VISCONTI, JOHN AI, ADJUSTMENT CONSTRUCTION CORPORATION, JOHN J. HART & SONS, INC.,

Salvatore Viscounti,
Appellant

(Criminal No. 75-420, D. of N.J.)

ORDER

Present: SEITZ, *Chief Judge*, VAN DUSEN and WEIS, *Circuit Judges.*

ORDERED that motion by appellant to return sealed portion of the transcript to the district court in order for defendant to petition district court to permit defendant to obtain a copy of the said sealed record is denied.

By the Court,

/s/ Seitz
Chief Judge

DATED: March 4, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1674
No. 76-1675

UNITED STATES OF AMERICA

v.

RAPHAEL BRESSLER, SALVATORE VISCONTI, JOHN J. HART, JR., VALERIE VISCONTI, JOHN AI, ADJUSTMENT CONSTRUCTION CORPORATION, JOHN J. HART & SONS, INC.,

Salvatore Viscounti, Appellant
in No. 76-1674

Valerie Viscounti, Appellant
in No. 76-1675

(Criminal No. 75-420, D. of N.J.)

ORDER

PRESENT: Seitz, *Chief Judge*, Van Dusen and Weis, *Circuit Judges.*

The Court having considered the petition for panel rehearing raising the claim that disposition of the rehearing petition should be held in abeyance until disposition of incompetency of counsel issue is presented to and resolved by the district court, presumably under a limited remand and having considered that 28 U.S.C.A. §2255 relief is only available to a defendant who is in custody and having

concluded that the interest in the finality of direct appeals should be the predominant consideration in cases in which a §2255 review is available in the district court albeit after incarceration, it is

ORDERED that the petition for rehearing before the panel is denied.

By the Court,

/s/ Seitz
Chief Judge

DATED: April 12, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1674

UNITED STATES OF AMERICA

v.

RAPHAEL BRESSLER, et al.,

Salvatore Viscounti, Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Ordered that appellant's amended brief for motion for rehearing and hearing en banc is to be filed.

By the Court,

/s/Seitz
Judge

Dated: April 12, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1675

UNITED STATES OF AMERICA

v.

RAPHAEL BRESSLER, et al.,

Valerie Viscounti, Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Judge

Dated: April 12, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1674

UNITED STATES OF AMERICA

v.

RAPHAEL BRESSLER, et al.,
SALVATORE VISCOUNTI, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 12, 1977.

/s/ Seitz
Chief *Judge*

Dated: April 14, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 75-420
	:	O R D E R
SALVATORE VISCONTI and	:	
VALERIE VISCONTI	:	

It is on this 18th day of March, 1977,

ORDERED that the motion for new trial be, and it hereby is, denied.

/s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

CERTIFICATE OF SERVICE

This will certify that I have served Jonathan Goldstein, United States Attorney for the District of New Jersey, and Richard D. Shapiro, Assistant United States District Attorney for the District of New Jersey, at the United States District Court for the District of New Jersey, Federal Courthouse, Newark, New Jersey; and Richard Uviller, Esquire, at 435 West 116th Street, New York, New York 10027, with copies of the within and foregoing Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit by depositing copies of the same in the United States Mail in properly addressed envelopes with adequate postage thereon.

THE 12th DAY OF May, 1977.

/s/Sidney L. Krawitz
SIDNEY L. KRAWITZ